85-970

No. ——

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

MARK A. THOMPSON,
Private, U.S. Marine Corps,
414 17 1780,

Petitioner,

v.

THE UNITED STATES,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF MILITARY APPEALS

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QUESTIONS PRESENTED

(1) May a Court of Military Review, established under Section 866 of Title 10, United States Code, in lawful discharge of the responsibilities imposed upon that Court by Subsection (c) of that Section, fail to decide specifically on the record issues of violations of rights and immunities guaranteed under the Constitution of the United States which, in a brief timely filed on behalf of a person convicted upon trial before a general court-martial, are asserted as having denied such person a lawful trial and as having resulted in such person's being erroneously convicted of infamous offenses and sentenced, *inter alia,* to seven years confinement at hard labor, thereby suffering deprivation of liberty and property without having been accorded due process of law in conformance to the Fifth Amendment to the United States Constitution?

(2) May the United States Court of Military Appeals, established under Section 867 of Title 10, United States Code, in a case which has been reviewed by a Court of Military Review, as set forth in (1), above, having granted a petition for review supplemented by assertions of constitutional errors as asserted before the Court of Military Review, plus the error of noncompliance by the Court of Military Review with its governing statute, lawfully ignore all asserted issues of constitutional error, and confine its decision solely to a technical issue of multiplicity of specifications for sentencing purposes, ultimately affirming the conviction and sentence without change?

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THE UNITED STATES,

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF MILITARY APPEALS

Petitioner, Mark A. Thompson, currently confined in the United States Disciplinary Barracks, Fort Leavenworth, Kansas, pursuant to the sentence of a general court-martial before which he was convicted on 19 August 1982, seeks a writ of certiorari through this petition to establish that courts-martial and reviewing and appellate tribunals established under the authority of the Congress to make Rules for the Government and Regulation of the land and naval Forces, in considering cases of individuals charged with infamous offenses which are not of a peculiarly military

character, are bound to adhere to the same precepts and traditions governing courts of the United States established under Article III of the Constitution of the United States, except only to such extent as so doing may be precluded by explicit Constitutional or statutory provisions or by demonstrable military exigencies of the moment.

An adjudicative system which requires participation by accredited professional lawyers at trial, review, and appellate stages, is but a facade so long as legal propositions advanced are not visibly considered and decided on the written record. What matters if a lawyer is constitutionally required to be permitted to make an oral summation, as in *Herring* v. *New York*,[1] or to file an appellate brief on first appeal, as in *Evitts* v. *Lucey*,[2] if the record is to provide no assurance that the matter presented has been in any way heard and considered? As enactment of the Uniform Code of Military Justice[3] rendered feasible the transition from *Dynes* v. *Hoover*[4] to *Burns* v. *Wilson*,[5] so now has the Military Justice Act of 1983[6] opened the door to a less cumbrous means of affording responsible civil court oversight on a selective basis. The case of the instant petitioner affords an ideal vehicle for this enlightened further step. The correction sought, i.e., to require explication of decisions by military re-

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[1] 422 U.S. 853, 45 L.Ed.2d 593, 95 S.Ct. 2350 (1975).

[2] ____ U.S. ____, 83 L.Ed.2d 821, 105 S.Ct. 830, 53 LW 4101 (1985).

[3] § 1, Act of 5 May 1950, PL 81-506, 64 Stat. 108, now codified as Chapter 47 of Title 10, U.S. Code.

[4] 20 How. (61 U.S.) 82, 15 L.Ed. 845 (1858).

[5] 346 U.S. 137, 97 L.Ed. 1508, 73 S.Ct. 1045 (1953).

[6] PL 98-209, approved December 6, 1983, 97 Stat. 1393.

view and appellate courts, will, if effected, tend both to reduce the frequency of applications for certiorari and habeas corpus and vastly to expedite disposition of such applications as are made to civil courts. Such correction would tend to effectuate a principal purpose of the Congress in enacting the Uniform Code of Military Justice in 1950, as in amendments made since through 1983, tending to perfect that basic structure. That purpose is to preserve the court-martial as a necessary disciplinary device, but to assure that its character will be that of a tribunal controlled by law, not by whims of ever changing persons in positions of military command authority.[7]

Concerning offenses suspected which are not purely military in character, *O'Callahan* v. *Parker*[8] indicates that virtually all such cases can, and a great many constitutionally must, be tried in civil courts on the basis of grand jury indictments or presentments. In cases of that class, where internal discipline and morale would be adversely affected if a military prosecution were to result in no conviction, the civil alternative is far more palatable than the assurance of military conviction, regardless of controlling law, through subtle command influence on the military personnel record evaluations of participants in the court-martial adjudicative system. As to any counterargument that civil prosecutions would deprive lawyers in uniform of a major area of professional experience, it is submitted that ample employment of professional skills would be found in civil arenas, and that professional

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[7] Index and Legislative History, Uniform Code of Military Justice, United States Government Printing Office, Washington, 1950.

[8] 395 U.S. 258, 23 L.Ed.2d 29, 89 S.Ct. 1683 (1969).

enhancement, not stagnation would prove to be the usual outcome.

Petitioner respectfully requests that a Writ of Certiorari issue to review the final judgment of the United States Court of Military Appeals, rendered 26 October 1985, affirming a 9 November 1983 per curiam decision of a Court of Military Review, which approved without change findings and sentence adjudged 19 August 1982 by a General Court-Martial, as reviewed and approved 17 December 1982 by the authority convening the General Court-Martial, who disapproved the findings of guilty as to one offense, but made no change in the sentence upon reassessment.

OPINION BELOW

Appendix 1a through 7a sets forth a copy of the 26 September 1985 Order of the United States Court of Military Appeals, concluding review by that Court of the court-martial conviction of the petitioner. Appendix 8a sets forth a copy of a 28 October 1985 Order of the United States Court of Military Appeals, denying a petition for new trial, on the basis of newly discovered evidence, which petition had been filed on behalf of the petitioner during the pendency of the review of his case by the United States Court of Military Appeals. Appendix 9a and 11a set forth a copy of the per curiam decision of 9 November 1983 of the United States Navy-Marine Corps Court of Military Review, approving the findings and sentence of the general court-martial in the case of the petitioner.

JURISDICTION

Jurisdiction of this Court is established by Section 1259 of Title 28, United States Code, added by Sec-

tion 10 of the Military Justice Act of 1983,* effective on and after 1 August 1984. Pursuant to Rule 20.1 of the Rules of the Supreme Court, as amended July 5, 1984, this Petition is filed within sixty days of the entry of the final judgment Order of the United States Court of Military Appeals, disposing of its grant of review in this case, Appendix 1a-7a.

CONSTITUTIONAL PROVISIONS INVOLVED

Article I, Section 8, Clause 14, provides that the Congress shall have power:

> To make Rules for the Government and Regulation of the land and naval Forces.

Amendment IV provides:

> The right of the people to be secure in their persons, houses, and effects against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched and the persons or things to be seized.

Amendment V provides, in pertinent excerpt:

> No person shall . . . be deprived of life, liberty, or property, without due process of law . . .

Amendment VI provides, in pertinent excerpt:

> In all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defense.

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*PL 98-209, 98th Congress, approved December 6, 1983, 97 Stat. 1393.

STATUTORY PROVISIONS INVOLVED

Section 866 of Title 10, United States Code, provides, in pertinent excerpt:

§ 866. Art. 66. Review by Court of Military Review.

(a) Each Judge Advocate General shall establish a Court of Military Review . . .

(b) The Judge Advocate General shall refer to a Court of Military Review the record in each case of trial by court-martial—

(1) in which the sentence, as approved, extends to . . . dishonorable or bad-conduct discharge, or confinement for one year or more: . . .

* * * *

(c) In a case referred to it, the Court of Military Review may act only with respect to the findings and sentence as approved by the convening authority. It may affirm only such findings of guilty and the sentence or such part or amount of the sentence, as it finds correct in law and fact and determines, on the basis of the entire record, should be approved. In considering the record, it may weigh the evidence, judge the credibility of witnesses, and determine controverted questions of fact, recognizing that the trial court saw and heard the witnesses.

(d) If the Court of Military Review sets aside the findings and sentence, it may, except where the setting aside is based on lack of sufficient evidence in the record to support the findings, order a rehearing. If it sets aside the findings and sentence and does not order a rehearing, it shall order that the charges be dismissed.

* * * *

Section 867 of Title 10, United States Code, provides, in pertinent excerpt:

§ 867. Art. 67. Review by the Court of Military Appeals

(a) (1) There is a United States Court of Military Appeals established under Article I of the Constitution of the United States and located for administrative purposes only in the Department of Defense . . .

* * * *

(b) The Court of Military Appeals shall review the record in—

* * * *

(3) All cases reviewed by a Court of Military Review in which, upon petition of the accused and on good cause shown, the Court of Military Appeals has granted a review.

* * * *

(d) In any case reviewed by it, the Court of Military Appeals may act only with respect to the findings and sentence as approved by the convening authority and as affirmed or set aside as incorrect in law by the board of review. [sic] . . . In a case reviewed upon petition of the accused, that action need be taken only with respect to issues specified in the grant of review. The Court of Military Appeals shall take action only with respect to matters of law.

(e) If the Court of Military Appeals sets aside the findings and sentence, it may, except where the setting aside is based on a lack of sufficient evidence in the record to support the findings, order a rehearing. If it sets aside the findings and sentence and does not order a rehearing, it shall order that the charges be dismissed.

(f) After it has acted on a case, the Court of Military Appeals may direct the Judge Advocate General to return the record to the Court of Military Review for further review in accordance with the decision of the Court. Otherwise, unless there

is to be further action by the President or the Secretary concerned, the Judge Advocate General shall instruct the convening authority to take action in accordance with that decision. If the court has ordered a rehearing, but the convening authority finds a rehearing impracticable he may dismiss the charges.

* * * *

(h) (1) Decisions of the Court of Military Appeals are subject to review by the Supreme Court by writ of certiorari as provided in section 1259 of title 28. The Supreme Court may not review by writ of certiorari under such section any action of the Court of Military Appeals in refusing to grant a petition for review.

(2) The accused may petition the Supreme Court for a writ of certiorari without prepayment of fees and costs or security therefor and without filing the affidavit required by section 1915(a) of title 28.

Section 831 of Title 10, United States Code, provides:

§ 831. Art. 31. Compulsory self-incrimination prohibited

(a) No person subject to this chapter [Chapter 47 of Title 10, U.S. Code, the Uniform Code of Military Justice] may compel any person to incriminate himself or to answer any question the answer to which may tend to incriminate him.

(b) No person subject to this chapter may interrogate, or request any statement from, an accused or a person suspected of an offense without first informing him of the nature of the accusation and advising him that he does not have to make any statement regarding the offense of which he is accused or suspected and that any statement made by him may be used as evidence against him in a trial by court-martial.

(c) No person subject to this chapter may compel any person to make a statement or produce evidence before any military tribunal if the statement or evidence is not material to the issue and may tend to degrade him.

(d) No statement obtained from any person in violation of this article or through the use of coercion, unlawful influence, or unlawful inducement may be received in evidence against him in a trial by court-martial.

PROVISIONS OF REGULATIONS INVOLVED

The Manual for Courts-Martial, United States, 1969 (Revised edition), as amended by changes promulgated through 20 January 1982, was in effect at the time of the offenses alleged against the petitioner, and at the time of his trial before a general court-martial in August, 1982. Rules 311, 313-316, and 321 of the Rules of Evidence, promulgated by the President of the United States, pursuant to the legislative rulemaking authority conferred upon the President by Section 836 of Title 10, United States Code, provided in pertinent excerpt:

Rule 311. Evidence Obtained from Unlawful Searches and Seizures

(a) *General rule.* Evidence obtained as a result of an unlawful search or seizure made by a person acting in a governmental capacity is inadmissible against the accused if:

(1) *Objection.* The accused makes a timely motion to suppress or an objection to the evidence under this rule; and

(2) *Adequate interest.* The accused had a reasonable expectation of privacy in the person, place or property searched; the accused had a legitimate interest in the property or evidence

seized when challenging a seizure; or the accused would otherwise have grounds to object to the search or seizure under the Constitution of the United States as applied to members of the armed forces.

* * * *

(c) *Nature of search or seizure.* A search or seizure is "unlawful" if it was conducted, instigated, or participated in by:

(1) *Military personnel.* Military personnel or their agents and was in violation of the Constitution of the United States as applied to members of the armed forces, an Act of Congress applicable to trials by court-martial that requires exclusion of evidence obtained in violation thereof, or Rules 312-317:

* * * *

Rule 313. Inspections and Inventories in the Armed Forces

(a) *General rule.* Evidence obtained from inspections and inventories in the armed forces conducted in accordance with this rule is admissible at trial when relevant and not otherwise inadmissible under these rules.

(b) *Inspections.* An "inspection" is an examination of the whole or part of a unit, organization, installation, vessel, aircraft, or vehicle, including an examination conducted at entrance and exit points, conducted as an incident of command the primary purpose of which is to determine and to ensure the security, military fitness, or good order and discipline of the unit, organization, installation, vessel, aircraft, or vehicle . . . An examination made for the primary purpose of obtaining evidence for use in a trial by court-martial or in other disciplinary proceedings is not an inspection within the meaning of this rule . . .

(c) *Inventories.* Unlawful weapons, contraband, or other evidence of crime discovered in the pro-

cess of an inventory, the primary purpose of which is administrative in nature, may be seized . . . An examination made for the primary purpose of obtaining evidence for use in a trial by court-martial or in other disciplinary proceedings is not an inventory within the meaning of this rule.

Rule 314. Searches Not Requiring Probable Cause

(a) *General Rule.* Evidence obtained from reasonable searches not requiring probable cause conducted pursuant to this rule is admissible at trial when relevant and not otherwise inadmissible under these rules.

* * * *

(d) *Searches of government property.* Government property may be searched under this rule unless the person to whom the property is issued or assigned has a reasonable expectation of privacy therein at the time of the search . . . Wall or floor lockers in living quarters issued for the purpose of storing personal possessions normally are issued for personal use: but the determination as to whether a person has a reasonable expectation of privacy in government property issued for personal use depends on the facts and circumstances at the time of the search.

(c) *Consent searches.*

(1) *General rule.* Searches may be conducted of any person or property with lawful consent.

(2) *Who may consent.* A person may consent to a search of his or her person or property or both, unless control over such property has been given to another. A person may grant consent to search property when the person exercises control over that property.

* * * *

Rule 315. Probable Cause Searches

(a) *General rule.* Evidence obtained from searches requiring probable cause conducted in accordance with this rule is admissible at trial when relevant and not otherwise inadmissible under these rules.

* * * *

(c) *Scope of authorization.* A search authorization may be issued under this rule for a search of:

* * * *

(3) *Persons and property within military control.* Persons or property situated on or in a military installation, encampment, vessel, aircraft, vehicle, or any other location under military control, wherever located . . .

* * * *

(d) *Power to authorize.* Authorization to search pursuant to this rule may be granted by an impartial individual in the following categories:

(1) *Commander.* A commanding officer . . . who has control over the place where the property or person to be searched is situated or found.

* * * *

Rule 316. Seizures

(a) *General rule.* Evidence obtained from seizures conducted in accordance with this rule is admissible at trial if the evidence was not obtained as a result of an unlawful search . . .

(b) *Seizure of property.* Probable cause to seize property or evidence exists when there is reasonable belief that the property or evidence is an unlawful weapon, contraband, evidence of crime, or might be used to resist apprehension or to escape . . .

* * * *

Rule 321. Eyewitness identification

(a) *General rule.*

* * * *

(2) *Exclusionary rule.* An identification of the accused as being a participant in an offense, whether such identification is made at the trial or otherwise, is inadmissible against the accused if

(A) the accused makes a timely motion to suppress or an objection to the evidence under this rule and if the identification is the result of an unlawful lineup or other unlawful identification practice conducted by the United States or other domestic authorities; or

(B) exclusion of the evidence is required by the due process clause of the Fifth Amendment to the Constitution of the United States as applied to members of the armed forces. Evidence other than an identification of the accused that is obtained as a result of an unlawful lineup or unlawful identification process is inadmissible against the accused if the accused makes a timely motion to suppress or an objection to the evidence under this rule and if exclusion of the evidence is required under the Constitution of the United States as applied to members of the armed forces.

(b) *Definition of "unlawful".*

(1) *Lineups and other identification processes.* A lineup or other identification process is "unlawful" if it is

(A) conducted by persons subject to the Uniform Code of Military Justice or their agents and is unnecessarily suggestive or otherwise in violation of the due process clause of the Fifth Amendment to the Constitution of the United States as applied to members of the armed forces; or

(B) conducted by other authorities of the United States . . . and is unnecessarily sug-

gestive or otherwise in violation of the due process clause of the Fifth Amendment to the Constitution of the United States.

(2) *Lineups: right to counsel.* A lineup is "unlawful" if it is conducted in violation of the following rights to counsel:

(A) *Military lineups.* An accused or suspect is entitled to counsel if, after preferral of charges or imposition of pretrial restraint . . . for the offense under investigation, the accused is subjected by persons subject to the Uniform Code of Military Justice or their agents to a lineup for the purpose of identification . . . The accused or suspect may waive the rights provided in this rule if the waiver is freely, knowingly, and intelligently made.

* * * *

(d) *Burden of proof* . . .

* * * *

(2) *Unnecessarily suggestive identification.* When an objection raises the issues of an unnecessarily suggestive identification process or other violation of due process under this rule, the prosecution must prove by a preponderance of the evidence that the lineup or other identification process was not so unnecessarily suggestive, in light of the totality of the circumstances, as to create a very substantial likelihood of irreparable mistaken identity; provided, however, that if the military judge determines that the identification process, although unnecessarily suggestive, did not create a very substantial likelihood of irreparable mistaken identity, a later identification may be admitted into evidence if the government proves by clear and convincing evidence that the subsequent identification is not the result of the improper identification.

* * * *

STATEMENT OF FACTS

This case concerns two completed and one aborted armed robberies, committed on the Marine Corps Base at Camp Lejeune, near Jacksonville, in eastern North Carolina. The crimes were committed on a pay day Saturday night, June 15, 1982. The two completed robberies were committed during hours of darkness on the night of June 15; the aborted robbery, during the early morning hours of June 16th. There were three victim eyewitnesses, and a fourth eyewitness who was accompanying the victim of the aborted robbery, conducting him back to his barracks, when two men were seen whom the previous victim identified as the men who shortly before had undertaken to rob him, and whose undertaking he had thwarted by running away. The four eyewitnesses were all white Marines. All agreed that the two persons who had accosted them on four separate occasions had dark skins, one darker than the other. One of the victims said that the one with the darker skin was the one who was carrying a handgun. The victims and the accompanying eyewitness said that the man with the darker skin was taller than his companion, two stating that he was 3-4 inches taller.

The Petitioner, Thompson, is black with a dark skin. He is a Marine, who, during the relevant period, was serving as a mess cook at Camp Lejeune. He lived in a "squadbay" (dormitory area) in barracks along with other Marines who were assigned to mess duties. He had a woman friend who lived in an apartment in Wilmington, North Carolina, about an hour's drive away, and he kept much of his clothing and personal effects in that apartment, in which he spent much of his off-duty time. Other Marines who were assigned to

the same squadbay in barracks with Petitioner included a black Marine named Saunders and other black Marines named Larochester and Ballard.

During the period from Monday, June 17, until about Thursday, June 27, Petitioner was confined in the "brig" (correctional facility) at Camp Lejeune, serving the ten day confinement at hard labor portion of a sentence which had been imposed upon conviction by a summary court-martial of an absence offense. That conviction and the resulting sentence were in nowise tinged with any suspicion of robbery or other felonious acts, and bore no relation to the events of 15-16 June. Prior to going from the squadbay to the brig on the 17th, Petitioner was asked by the First Sergeant—Lawson—who had supervisory authority over the barracks area in which was located the squadbay to which the Petitioner and others were assigned, whether Petitioner had any property in the squadbay. It was standard practice to inventory and sequester for safekeeping personal effects of Marines who it was known would be away from the squadbay for an extended period. Petitioner responded that he did not have any personal effects in the squadbay; that his effects were with his friend in Wilmington.

While Petitioner was absent from the squadbay, the Naval Investigative Service office at Camp Lejeune was pursuing an investigation of the June 15-16 on-base robberies. The eyewitness victims were interrogated soon after the incidents, and composite drawings were made from the descriptions of the robbers they furnished. The Special Agent handling the investigation—Bell—seems to have suspected early on that Larochester might have been one of the robbers. Larochester had an unsavory reputation as having an

expensive drug addiction which he was financially hard pressed to support. Special Agent Bell went to see First Sergeant Lawson, and asked if Larochester might be pointed out to him. Upon seeing Larochester, Bell concluded that he did not resemble either of the composite drawings. Lawson asked if he might see a drawing, and upon being shown it by Bell, saw a resemblance to someone he knew, but could not recall the name. Lawson later remembered that the Marine who resembled the drawing was Saunders, and he called Special Agent Bell to return to the barracks. On Saturday, June 22nd—one week after the date of the robberies—Bell came to the barracks and talked with Saunders, who was called into the office of First Sergeant Lawson. Saunders gave his permission for Special Agent Bell to check his personal effects in the squadbay. The check was made and proved negative for any incriminating evidence. Special Agent Bell seems to have left the barracks.

Special Agent Bell seems to have talked with Larochester and to have indicated that he might speak to Larochester's Battalion Commander with reference to disciplinary difficulties Larochester was experiencing —indicating that Larochester was cooperating in the investigation of the robberies. During cross-examination of First Sergeant Lawson at the later General Court-Martial trial of Petitioner, counsel for Petitioner was able to extract from Lawson a reluctant admission that Larochester had told Lawson that a handgun and a sweater might be found among effects of the Petitioner, Thompson, which were in the squadbay.

Sergeant Lawson testified that after Special Agent Bell had conducted the search of Saunders's effects,

pursuant to his consent, Sergeant Lawson noted a wall locker on which had been written in grease pencil the name "Saunders." Saunders denied that the locker was his. The I ergeant testified under cross-examination that he had asked Marines in the barracks who might be using the wall locker bearing the grease-pencilled name Saunders, and that Larochester and Ballard told him that the wall locker was one used by the Petitioner, Thompson. Lawson sent a corporal to obtain bolt cutters, and upon the corporal's return, the lock on the wall locker was cut and contents removed. The contents were said to consist of clothing belonging to Petitioner, but it is not clear how the identification was made. In any event, nothing of a suspicious character seems to have been found in the wall locker. Contents of the wall locker were inventoried and sent to Supply for safekeeping.

Larochester and Ballard then told Lawson that Petitioner had a foot locker in the squadbay. A foot locker was seen under a bunk bed near the wall locker. The First Sergeant had the lock cut on the foot locker, and, upon noting that it contained some effects, picked it up and carried it into his office. In the foot locker was a box which the First Sergeant thought might contain a pistol. He called the Naval Investigative Service office, and turned the box over to that office, obtaining a receipt. The box was found to contain a pistol which was ascertained to have been purchased by Petitioner at a pawn shop in Wilmington. The purchase of the pistol was legitimate, and was duly registered, the date of sale being indicated as May 6, 1982.

One identifiable fingerprint was seen on the pistol. It was sent, along with fingerprints and full hand-

prints of Saunders and Petitioner, to the Army Crime Laboratory at Fort Gordon, Georgia. No fingerprints of any other Marines were sent to the Crime Laboratory. The Crime Laboratory reported that the fingerprint on the pistol did not match any of either Petitioner or Saunders.

On or shortly after June 22nd, one week following the robberies, one of the Marines who had been robbed of $140.00, was shown two sets of photographs, each of six men. One of the sets was of black men with dark skins. The other set was of men with dark skins of a lighter hue. A photograph of the Petitioner was included in the set of pictures of men with darker skins. A photograph of Saunders was included in the set of photographs of men with lighter skins. The Marine who had lost the $140 was unable to identify any of the twelve as appearing to be of a man who had participated in the robbery of him.

Another Marine, who had been robbed of $10, was shown the same two sets of photographs. From among the photographs of men with lighter skins, that Marine identified the photograph of Saunders as depicting one of the men who had participated in the robbery of him. He was not able to identify any of the photographs of men with darker skins as depicting a participant in the robbery.

There is no indication that photographs were exhibited to the other two Marine eyewitnesses. One of those had been drinking during the evening, and had previously stated that he did not have a sufficiently clear recollection of the appearance of either of the two men to be able to contribute to the drawing of a composite photograph. Both of those Marines stated,

however, that the man with the darker skin was carrying a handgun, and that he was 3-4 inches taller than the other man with the lighter skin.

Saunders and the Petitioner were confined on suspicion of robbery. A pre-trial investigation was scheduled for Monday, July 14th. On that day, a Base legal officer who was later to act as the Trial Counsel, instructed the four eyewitnesses to go into a waiting room for witnesses who were to be examined by the Investigating Officer, and be alert to see if any person who came into the room might be recognized by any of them as a person who had participated in any of the robberies. While the four were waiting thus alerted, the Petitioner and Saunders were brought into the room, shackled with handcuffs and leg irons, and each accompanied by three Marine guards, identifiable as such by web belts which they wore.

After that dramatic showup, the Trial Defense Counsel managed to get the Petitioner unshackled and brought into his office. He had several other dark skinned black persons in his office at the time, and had one of the four eyewitnesses—the one who had been robbed of $140—come to his office, and asked him to examine the men in the office very carefully to see if he could identify any of them as a participant in the robbery of him. The Marine was not able to identify any of the men in the office as a participant.

In testifying before the pre-trial investigating officer, three of the four Marine eyewitnesses, including the one who had not been able to identify Petitioner in the Defense Counsel's office, were positive in their identifications of both Petitioner and Saunders. The Fourth Marine—the one who had seen the two men

and been threatened while starting to accompany the third Marine back to his barracks—did not testify at the pre-trial investigation. All four Marines testified at the General Court-Martial trial of the Petitioner, held on 17-18 August 1982, and each was positive in his identification of the Petitioner as one of the participants in the robberies.

At the trial of the Petitioner, he and Saunders were demonstrated to be of the same height.

At Petitioner's trial, medical records were introduced by the defense, showing that Petitioner had a plantar wart surgically excised from the 'inside of his right heel on the morning of June 15th. A Hospitalman, First Class, testified that petitioner would not have been able to bear any weight on that foot for 3-4 days following the surgery, and that the toe portion of the foot would have been the only part he could put on the ground while walking. None of the eyewitnesses testified to observing anything unusual in the gait of either of their assailants, and one said that the assailant who had displayed the handgun *ran* from the scene.

A disbursing clerk testified that Petitioner had been paid $320 on the afternoon of June 15—some $59 more than he customarily received—and that he saw petitioner leave the building at about 2-3 p.m., with a motorcycle helmet under his arm, and received an affirmative response when he asked Petitioner if he were going to Wilmington.

The wife of an Army Sergeant testified as a defense witness. She stated that she shared an apartment in Wilmington with the woman friend of the Petitioner; that at about 10 p.m. on June 15th, Petitioner and his

woman friend had gone motorcycle riding, returning shortly after midnight; and that Petitioner had spent the remainder of the night in their apartment in Wilmington.

The woman friend of Petitioner testified that Petitioner spent the late afternoon and night of June 15th with her.

The most credible defense alibi witness was a University of North Carolina senior who testified that he was working in a bottling plant to finance his education; that he lived in an apartment across the hall from that of the Petitioner's woman friend and the wife of the Army Sergeant; that to his knowledge Petitioner frequently visited that apartment; and that, between 9 and 10 p.m. on the night of June 15th, Petitioner had come to his apartment and borrowed a motorcycle helmet, stating that he wished to take his woman friend riding on his motorcycle with him.

On August 12, 1982—six days before the trial of Petitioner—Saunders was brought to trial before a General Court-Martial, and pleaded guilty of having committed the acts of robbery described on June 15th. At the trial of Petitioner, Saunders testified under a grant of immunity from further prosecution. On August 12th, the day of his trial, Saunders had talked with the trial defense counsel for the Petitioner. At that time he told the trial defense counsel that he did not know who had committed the robberies with him. Saunders testified at the trial of the Petitioner that he and the Petitioner had been drinking at the enlisted men's club on the Marine Corps Base on the evening of June 15th. He said that he had not been paid on that day, and that the Petitioner had received less pay than he had expected. According to Saunders, Petitioner

had the handgun concealed in his shirt jacket while they were in the enlisted men's club; they left the club and successively committed two of the robberies; returned to the club and drank some more; and then started toward their barracks and on the way encountered the third Marine, whom they unsuccessfully attempted to rob. Shortly thereafter that Marine reappeared with a fourth, and after some talk among the four of them, the Petitioner said "Forget it," and they went back to their barracks. The testimony of Saunders stuck close to the script, he naming the victims and stating the precise amounts taken from each of the two from whom they obtained money, bearing out the specifications line by line.

A petition for new trial was submitted to the Judge Advocate General of the Navy by the Petitioner under date of September 9, 1983. Attached to that petition were affidavits of Petitioner and of one Velasquez. Petitioner, Velasquez, and Saunders were all at the time confined in the Disciplinary Barracks at Fort Leavenworth, Kansas. Velasquez had no connection with the June 15, 1982, events at Camp Lejeune. Velasquez, however, knew both the Petitioner and Saunders, and knew that they were convicted of having committed offenses together. Velasquez swore that he and Saunders had been working together in the "chowhall" [food preparing and serving facility] at the Disciplinary Barracks. Velasquez stated that Saunders had admitted to Velasquez that Saunders had made "false statements and that he lied in court to bring Thompson to his conviction. He also admit that Thompson was not involved in the robbery in any way, but that another individual was." Velasquez claimed that Saunders told him that Saunders would reveal the

truth only if Thompson (the Petitioner) "will make it worth my while," and further that Saunders told Velasquez "He'd admit to lying and do the time for perjury, only if Thompson would pay a certain amount of money. Thompson refused because of his demands and Saunders decided not to cooperate." The Petitioner's affidavit, in support of his petition for new trial, sworn to on 3 August 1983, denied involvement in the robberies at Camp Lejeune, and denied knowledge of who, other than Saunders, was involved. He said that he had "an occasion to talk with Saunders and ask him why did he lie on me. He says that he was forced into it and that he did not want to get any more time. I did talk to him about getting everything straightened out, to tell the truth, and just think about what he is putting me through for something I did not do. His reply was that I would have to make it worth his while to tell the truth meaning that I would have to pay him some money. At that time, I walked away from him because I was very angry. After that happened, Saunders went and talked to Velasquez about what had happened and that he was not feeling too good about me. After that, Velasquez saw me and started asking me a lot of questions about my case."

The Judge Advocate General did not transmit the petition for new trial to the Court of Military Review prior to the time that the Court acted on 9 November 1983. The petition was forwarded to the Court of Military Appeals, before which Court was pending a petition for grant of review of the action of the Court of Military Review. A 21-page brief in support of the petition for new trial was filed with the Court of Military Appeals on February 21, 1984. An Order of the Court of Military Appeals of October 26, 1985, Appendix 8a, announced denial of the petition.

At the General Court-Martial trial of Petitioner, the Military Judge sustained objection by the prosecution to trial defense counsel's cross-examining the Special Agent of the Naval Investigative Service concerning transactions between that Agent and Larochester. The Military Judge sustained objection to defense counsel's questioning the Special Agent concerning eyewitness/victims initial statements as to identification of their assailants. That objection was sustained on the ground that it went beyond the scope of direct examination which had been concerned with the identification of the handgun. The Military Judge sustained objection by the prosecution to a defense question as to the height of the petitioner as shown on a fingerprint card on which the Special Agent had made fingerprint impressions of the Petitioner. The Military Judge refused to allow defense counsel to show, through testimony of the Special Agent, that the Naval Investigative Service had not sent any fingerprints of Larochester to Fort Gordon to be compared with the print on the weapon.

Whether motivated by pangs of conscience or otherwise, Larochester talked to the trial defense counsel during early July. On 12 July 1982, Larochester made a sworn statement to trial defense counsel in which he indicated that the Special Agent of the Naval Investigative Service had talked to Larochester on 22 and 23 June, and had taken a written statement from Larochester on the latter date. Larochester told the Special Agent that if Larochester were to help in the investigation of the robberies, the Special Agent would have to assist Larochester with some charges that the latter was facing in his Battalion. Larochester stated that the Special Agent had told him that two or three

of the victims had identified Saunders, and it was Larochester's recollection that the Special Agent may have told him that Thompson (the Petitioner) had been identified also. Larochester then said that he had told the Special Agent what he knew about Saunders and Thompson (the Petitioner).

Larochester said that in the statement he had made to the Naval Investigative Service he set forth his knowledge of the Petitioner having purchased a handgun in Wilmington; that "Private Thompson bought this gun because he was having trouble with locals in Wilmington." Larochester said that he had made some reference in his statement to the Naval Investigative Service about having at some time seen the gun of Petitioner in Petitioner's waistband, but that such statement was false. Apparently, further recanting portions of the statement he had made to the Naval Investigative Service, Larochester asserted in the sworn statement made to Trial Defense Counsel, "I did not hear Thompson say anything about robbing anyone, nor did I hear him talking about robbery with Davis or Morales. Davis told me about Thompson having joked with him about robbery, but I don't know when that conversation took place." Larochester concluded, "Tell me what I can do or say to help THOMPSON and SAUNDERS. I don't want to be involved in a general court-martial. I just want to get out."

As a matter of surmise, the trial defense counsel probably planned to produce Larochester as a surprise defense witness in the trial of Petitioner. Larochester, however, appears to have become an unauthorized absentee as of 17 August 1982, the day the trial of Petitioner commenced. The Military Judge

refused to allow introduction of the sworn statement of Larochester on the basis of the hearsay rule. The Military Judge refused to allow trial defense counsel to question a witness, Davis, as to knowledge of the witness about the lifestyle of Larochester. The Military Judge responded to defense counsel's protest of Larochster's having had a motive to implicate the Petitioner, with an erroneous statement (concurred in by the Trial Counsel) that it was Ballard, rather than Larochester, who had told the First Sergeant that a gun might be found among Petitioner's effects. The testimony of the First Sergeant, dragged out of him by persistent cross-examination, reminding him of previous conversations with defense counsel, was ultimately positive that Larochester had told him that Petitioner had a gun in his gear [personal effects] in the squadbay.

The enforced absence of Petitioner from the squadbay during the week of 17-22 June provided an opportunity for anyone to "plant" the weapon in the foot locker. Had the search procedure prescribed by the Military Rules of Evidence (pages 8-11, *supra*), been followed, with Petitioner having been approached concerning the allegations of his having possessions in the wall locker and the foot locker, and asking if he would consent to a search, it is probable that an explanation might have been forthcoming as to the history of the weapon and persons who may have had possession of, or access to, that weapon. The illegality of the search and seizure was tacitly recognized by the Convening Authority in disapproving the findings of guilty of the offense of having possession of the weapon on Base, in violation of local regulations. Such was not recognized by the Military Judge, how-

ever, in denying the defense motion to suppress production of the handgun in evidence. Victim-eyewitness identification of the weapon as the particular one with which victims were threatened, is hardly credible. The testimony of the asserted accomplice, Saunders, is ultimately the foundation on which such identification must rest. Accomplice recantation is no more trustworthy than the uncorroborated accomplice testimony rendered in the first instance, but the overtures toward recantation would provide provocative matter for examination were a new trial to be ordered.

The unnecessary suggestibility of having the two suspects produced for identification by the sole non-implicated eyewitnesses—in handcuffs and leg irons and each accompanied by three web-belted guards—was egregious. The Military Judge refused to suppress the identification evidence of those witnesses, however, and neither the Court of Military Review nor the Court of Military Appeals saw fit to advert to the matter in any way. The likelihood of irreparable mistaken identity approached certainty, and in view of the specific provisions of Rule 321 of the Military Rules of Evidence, pages 11-12, *supra,* there was implicated a due process deprivation under *Vitarelli* v. *Seaton,*[10] as well as under the *Wade* doctrine.[11]

CONCLUSION

The Petitioner was twenty-one years of age at the time of his conviction in August, 1982. He had completed twelve years of formal education before enter-

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[10] 359 U.S. 535, 3 L.Ed.2d 1012, 79 S.Ct. 968 (1959).

[11] United States v. Wade, 388 U.S. 218, 18 L.Ed.2d 1149, 87 S.Ct. 1926 (1967).

ing the Marine Corps. He had been given relatively high duty proficiency and conduct marks prior to the alleged June 15, 1982, offenses, and his sole previous disciplinary offense was one of unauthorized absence. The process followed in condemning him to dishonorable discharge and seven years confinement at hard labor smacks of scapegoating, as opposed to painstaking investigation to the end of developing all details of an especially revolting species of crime and assessing punishment among all offenders according to respective degrees of implication and culpability.

The only shield of a military lawyer at command level is judicial precedent. With established published precedents alone can he or she counter arguments urged from standpoints of expediency—both from investigators and administrators below and command authority above—with a response, "The quick fix won't stick." The Congress sought to assure such precedents by mandating central review of major court-martial cases and providing oversight of the individual service review bodies by a central civilian Court. In 1983, the further step was taken of authorizing selective review upon writs of certiorari of actions of the central civilian oversight Court. Limitation of cases reviewable upon writ of certiorari to those in which a petition for review has been granted by the civilian oversight Court was a measure of necessity to preclude swamping the Supreme Court with certiorari applications by lawyers representing military clients, who could not justify failure to exhaust that one further avenue of possible relief which could be availed at no cost to the client and at no more than minimal inconvenience to counsel. Such limitation was not intended to, and constitutionally could not, con-

fine the Supreme Court to issues which the Court of Military Appeals preferred to deal with, as opposed to those substantive issues with which it was intended to grapple.

The assistance of counsel in criminal cases, guaranteed by the Sixth Amendment, refers to effective and meaningful assistance, not a ritualistic performance. That assistance does not terminate at the trial level, particularly in the armed forces where appellate defense counsel is provided at no expense to the accused. To be effective, counsel must have issues which they have raised considered and decided on the written record. It is for declaration of that basic proposition that it is asked that a writ of certiorari be issued to the United States Court of Military Appeals and that a plenary review be made in the case of the Petitioner, Mark A. Thompson.

Respectfully submitted,

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Counsel for Petitioner

APPENDIX

APPENDIX A

UNITED STATES
COURT OF MILITARY APPEALS

UNITED STATES, Appellee	USCMA Dkt. No. 48142/MC CMR Dkt. No. 83-0992
V.	ORDER
Mark A. THOMPSON (414-17-1780), Appellant	

On further consideration of the granted issue (19 M.J. 270) and the Government's concession of error, it appears that appellant was convicted of three separate conspiracies to commit robbery but the evidence shows that there was but one agreement between appellant and his co-actor to rob other Marines. The commission of different acts at different times does not,

standing alone, convert a single conspiracy into several conspiracies. United States v. Kidd, 13 U.S.C.M.A. 184, 190, 32 C.M.R. 184, 190 (1962); United States v. Nichols, 741 F.2d. 767, 771 (5th Cir. 1984), cert. denied, 105 S.Ct. 1186 (1985); see United States v. Snider, 720 F.2d 985, 988-90 (8th Cir. 1983), cert. denied, 104 S.Ct. 1613 (1984). In order to conform the pleadings to the proof, see United States v. Lee, 1 M.J. 15, 17 (C.M.A. 1975), specifications 1, 2, and 3 of Charge I should be consolidated to allege the robberies of Private Rossier and Private First Class Marinaro, as well as the corresponding overt acts. We are satisfied that this

consolidation may be effected without prejudice to appellant's substantial rights. Id. at 16.

The members were advised that the maximum confinement was 63 years; they sentenced appellant to 7 years. The correct maximum confinement, considering that the findings of guilty as to the offense of carrying a concealed weapon were disapproved and that we have concluded the conspiracy specifications should be consolidated, is 42 years. The staff judge advocate advised the convening authority "that for sentencing purposes, the three specifications under Charge I [conspiracy] . . . should be considered as one single offense for sentencing purposes." He further advised the convening authority that the maximum confinement would be

42 years if his recommendations were followed, and that because of "the [21-year] difference . . . in the maximum confinement which the members could have adjudged in this case, the sentence must be reassessed." (Review, p. 43). The action of the convening authority in reassessing the sentence reflects that he followed his staff judge advocate's recommendations. The Court of Military Review affirmed "the findings and sentence as approved on review below," unpublished opinion at 2, which indicates that they adopted the view of the staff judge advocate as to the maximum confinement. Under these circumstances, we are therefore satisfied that any prejudice as to sentence which appellant may have

suffered from the failure to consolidate the conspiracy specifications has been cured.

Accordingly, it is by the Court, this 26th day of September, 1985,

ORDERED:

That specifications 1, 2, and 3 of Charge I are consolidated as the specification of Charge I to read as follows:

> Specification: In that Private Mark A. THOMPSON, U.S. Marine Corps, Headquarters Battery, 1st Battalion, 10th Marines, 2d Marine Division, Fleet Marine Force, Camp Lejeune, North Carolina, did, at Camp Lejeune, North Carolina, on or about 15 or 16 June 1982, conspire with Private Raymond D. SAUNDERS, U.S. Marine Corps, to commit offenses under the Uniform Code of Military Justice, to wit: the robbery of U.S. currency of a value of about $140.00 from Private First Class Robert R. MEYERS, U.S. Marine Corps, and the robbery of U.S. currency of a value of $10.00 from Private

James A. ROSSIER, U.S. Marine Corps, and the robbery of U.S. currency of some value from Private First Class Robert J. MARINARO, U.S. Marine Corps; and that in order to effect the object of the conspiracy, the said Private THOMPSON did point a pistol at the said Private First Class MEYERS; the said Private SAUNDERS did grab the said Private First Class MEYERS about the torso and pin the right arm of the said Private First Class MEYERS; and the said Private SAUNDERS did reach into the left rear trouser pocket of the said Private First Class MEYERS and remove a wallet containing U.S. currency of a value of $140.00, the property of the said Private First Class MEYERS; and to further effect the object of said conspiracy the said Private THOMPSON did point a pistol at the said Private ROSSIER and the said Private SAUNDERS did remove from the pockets of the said Private ROSSIER, U.S. currency of value of $10.00, the property of the said Private ROSSIER; and the said Private THOMPSON did point a pistol at the said Private First Class MARINARO and the said Private SAUNDERS did say to the said Private First Class MARINARO "Let's see if you have any money," or words to that effect.

And that the decision of the United States Navy-Marine Corps Court of Military Review as to the consolidated specification of Charge I and Charge I, as well as Charges II, III, and Additional Charge I and their specifications and the sentence is affirmed.

For the Court,

/s/ John A. Cutts, III
Deputy Clerk of the Court

cc: The Judge Advocate General of the Navy
Appellate Defense Counsel (WALKUP, Esq.)
Appellate Government Counsel (VOLLENWEIDER)

UNITED STATES
COURT OF MILITARY APPEALS

UNITED STATES, Appellee	USCMA Dkt. No. 48142/MC CMR Dkt. No. 83-0992
V.	ORDER DENYING PETITION FOR RECONSIDERATION
Mark A. THOMPSON (414-17-1780), Appellant	

On consideration of the petition for new trial in the above-entitled case*, it is, by the Court, this 28th day of October, 1985

ORDERED:

That said petition is denied.

For the Court,

/s/ John A. Cutts, III
Deputy Clerk of the Court

cc: The Judge Advocate General of the Navy
Appellate Defense Counsel (WALKUP, Esq.)
Appellate Government Counsel (VOLLENWEIDER)

* Our Order of September 26, 1985, did not divest this Court of jurisdiction to resolve this petition now.

UNITED STATES NAVY-MARINE CORPS
COURT OF MILITARY REVIEW

No.

UNITED STATES OF AMERICA,
APPELLEE

V.

PRIVATE MARK A. THOMPSON,
U.S. Marine Corps,
Appellant

Decided 9 November 1983

Review pursuant to Article 66(c), UCMJ, of general court-martial convened by Commanding General, 2d Marine Division, FMF, Camp Lejeune, North Carolina 28542

Before SANDERS, MAY, and CASSEL, Military Judges.

PER CURIAM:

After action by a substitute general court-martial authority (the convening authority had granted immunity to a witness) appellant is before this Court with an approved sentence of a dishonorable discharge, total forfeitures and confinement at hard labor for seven years for conviction of three specifications of conspiracy under Article 81, Uniform Code of Military Justice (UCMJ), two specifications of robbery under Article 122, UCMJ, one specification of assault with intent to commit robbery under Article 134, UCMJ, and one specification alleging a violation of a general order under Article 92.

After a well litigated trial he has assigned six errors. Under the actual situation presented and decided at trial none of those has merit. The findings and sentence approved on review below are correct in law and fact and no error materially prejudicial to the substantial rights of appellant was committed. Accordingly, the findings and sentence as approved on review below are affirmed.

/s/ _____
EDWARD F. SANDERS,
Senior Judge

/s/ _____
J. S. MAY, Judge

/s/ _____
C. J. CASSEL, Judge

Supreme Court, U.S.
FILED
MAR 7 1986
JOSEPH F. SPANIOL, JR.
CLERK

(2)

No. 85-970

In the Supreme Court of the United States

OCTOBER TERM, 1985

MARK A. THOMPSON, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF MILITARY APPEALS

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether petitioner was denied due process of law when a Court of Military Review established under Article 66(a) of the Uniform Code of Military Justice, 10 U.S.C. (Supp. II) 866(a), summarily affirmed petitioner's general court-martial conviction without writing an opinion setting forth its reasons for rejecting petitioner's claims of error.

2. Whether the United States Court of Military Appeals abused its discretion when it granted petitioner's petition for review only with respect to an issue specified by the court, and, after receiving briefs from both parties, affirmed the decision of the Court of Military Review without discussing the issues presented by petitioner.

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In the Supreme Court of the United States

OCTOBER TERM, 1985

No. 85-970

MARK A. THOMPSON, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF MILITARY APPEALS

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The order of the United States Court of Military Appeals (Pet. App. 1a-7a) is reported at 21 M.J. 94. The decision of the United States Navy-Marine Corps Court of Military Review (Pet. App. 9a-11a) is unreported.

JURISDICTION

The judgment of the United States Court of Military Appeals was entered on September 26, 1985. The petition for a writ of certiorari was filed on November 25, 1985. The jurisdiction of this Court is invoked under 28 U.S.C. (Supp. I) 1259(3).

STATEMENT

Petitioner, a member of the United States Marine Corps, was convicted by a general court-martial convened by the Commanding General, Second Marine Division, Fleet

Marine Force, Camp Lejeune, North Carolina, of three specifications of conspiracy to commit robbery, one specification of carrying a privately-owned firearm contrary to a general order, one specification of assault with intent to commit robbery, and one specification of carrying a concealed weapon, in violation of Articles 81, 92, 122, and 134 of the Uniform Code of Military Justice (UCMJ), 10 U.S.C. 881, 892, 922, and 934. He was sentenced to a dishonorable discharge, confinement at hard labor for seven years, and forfeiture of all pay and allowances. A substitute convening authority reviewed the case pursuant to Article 60, UCMJ, 10 U.S.C. (Supp. II) 860, and disapproved the findings of guilty on the charge of carrying a concealed weapon but otherwise approved the findings and sentence.[1] The United States Navy-Marine Corps Court of Military Review affirmed the findings and sentence as modified and approved by the substitute convening authority (Pet. App. 9a-11a). On petition of the accused, the United States Court of Military Appeals granted review limited to one issue specified by the court.[2] As to that issue, the court concluded that, in order to conform the pleadings to the proof, the three specifications of conspiracy to commit robbery should be consolidated into one specification, but that the consolidation could be effected without prejudice to petitioner's substantial rights (Pet. App. 2a-3a). Accordingly, the court affirmed the decision of the Court of Military Review (*id.* at 7a).

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[1]Although not absolutely required by military law (see *United States* v. *Andreas*, 14 M.J. 483, 486-487 (C.M.A. 1983)), a substitute convening authority was assigned to review this case because the original convening authority had granted immunity to a government witness.

[2]The court specified the following issue for review (19 M.J. 270 (C.M.A. 1985)):

> Whether the military judge erred to the accused's prejudice in denying a defense motion to treat the three conspiracy specifications as one.

1. The evidence showed that on the evening of June 15, 1982, petitioner conspired with a fellow Marine to commit several robberies on base. On that evening, the two men robbed two other Marines at gun point. Shortly thereafter, during the early morning hours of June 16th, the two conspirators attempted to rob a third Marine. Tr. 121-123.

After his trial and conviction, petitioner assigned six errors for consideration by the United States Navy-Marine Corps Court of Military Review. The Court of Military Review affirmed the findings and sentence below in a per curiam opinion (Pet. App. 11a):

> After a well litigated trial [petitioner] has assigned six errors. Under the [f]actual situation presented and decided at trial none of those has merit. The findings and sentence approved on review below are correct in law and fact and no error materially prejudicial to the substantial rights of [petitioner] was committed. Accordingly, the findings and sentence as approved on review below are affirmed.

2. Petitioner sought further review before the United States Court of Military Appeals. In his petition for review, he raised four issues: two contentions relating to the denial of his motions to suppress certain evidence and two claims alleging that the Court of Military Review had denied him due process of law and effective assistance of counsel by failing to explain the basis for its per curiam decision affirming his conviction. Exercising its discretion under Article 67(b)(3), UCMJ, 10 U.S.C. 867(b)(3), the Court of Military Appeals granted review limited to one issue specified by the court. See note 2, *supra*. The court's order affirming the decision of the Court of Military Review discussed only the specified issue and did not address any of the four issues on which petitioner had unsuccessfully sought review (Pet. App. 1a-7a).

ARGUMENT

Without citation of any authority, petitioner seeks a rule compelling military appellate courts to issue opinions fully articulating the reasons underlying their disposition of each error assigned or issue presented on appeal. Neither the Constitution nor the statute establishing those courts imposes any such requirement. Moreover, the rule petitioner seeks would impose a totally unnecessary burden on military tribunals and would contravene the well-settled practice of the civilian courts of appeals. Finally, petitioner's contention that the Court of Military Appeals must accept every issue presented to it on petition for review ignores express statutory language to the contrary and the clear intent of Congress. Accordingly, review by this Court is not warranted.

1. a. This Court has recognized that even in criminal cases "[t]here is * * * no constitutional right to an appeal." *Jones* v. *Barnes*, 463 U.S. 745, 751 (1983). See also *Abney* v. *United States*, 431 U.S. 651, 656 (1977); *United States* v. *MacCollom*, 426 U.S. 317, 323 (1976) (plurality opinion). Thus, the existence and parameters of that right must be measured solely by the terms of the statutes and rules establishing the appellate process. See *Griffin* v. *Illinois*, 351 U.S. 12, 21 (1956) (Frankfurter, J., concurring); *McKane* v. *Durston*, 153 U.S. 684, 687-688 (1894). Where neither civilian nor military law governing criminal appeals requires an appellate court to address expressly and specifically each issue raised by the defendant, the Constitution, *a fortiori*, does not prescribe such a rule.

b. Contrary to petitioner's contention (Pet. 29), nothing in the language or purpose of the UCMJ requires military appellate courts to issue written opinions of any specified length or detail. In establishing the current system of appellate review of court-martial convictions, Congress sought to

insulate the appellate process from undue influence by military commanders while at the same time providing a uniform system that would not impede good order and discipline within the Armed Forces.[3] To accomplish these goals, Congress created a two-tiered review process. At the first level, review by a Court of Military Review is mandatory whenever, inter alia, the sentence extends to death, dishonorable or bad-conduct discharge, or confinement for more than one year. Art. 66(b)(1), UCMJ, 10 U.S.C. (Supp. II) 866(b)(1). The court must review the entire record and may affirm only those findings of guilt and sentences "as it finds correct in law and fact and determines, on the basis of the entire record, should be approved." Art. 66(c), UCMJ, 10 U.S.C. 866(c). The second tier in the military appellate system is the United States Court of Military Appeals. Review by that three-member civilian court is mandatory when the sentence extends to death or when the Judge Advocate General orders a case sent for review; in all other cases, the court has discretion to grant review "upon petition of the accused and on good cause shown." Art. 67(b)(3), UCMJ, 10 U.S.C. 867(b)(3). Thus, while carefully specifying the types of cases in which appellate review would be available, Congress in no way dictated the manner in which military courts must dispose of the cases that come before them.

c. In any event, requiring an appellate court to write a full opinion in every case would serve no useful purpose and would squander scarce judicial resources. Given the large

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[3]See S. Rep. 486, 81st Cong., 1st Sess. 6, 28-29 (1949); H.R. Rep. 491, 81st Cong., 1st Sess. 6-7, 31-32 (1949); *Uniform Code of Military Justice: Hearings on H.R. 2498 Before a Subcomm. of the House Comm. on Armed Services*, 81st Cong., 1st Sess. 608-612, 623-624 (1949); *Uniform Code of Military Justice: Hearings on S. 857 & H.R. 4080 Before a Subcomm. of the Senate Comm. on Armed Services*, 81st Cong., 1st Sess. 36, 42-43, 49, 91-92 (1949).

number of cases that come before the Courts of Military Review,[4] it simply is not possible to write lengthy opinions discussing each and every issue presented in every appeal. Appellate courts "should have wide latitude in their decisions of whether or how to write opinions." *Taylor* v. *McKeithen*, 407 U.S. 191, 194 n.4 (1972). Further, "[t]he fact that a disposition is by informal summary order rather than by formal published opinion in no way indicates that less than adequate consideration has been given to the claims raised in the appeal." *Furman* v. *United States*, 720 F.2d 263, 265 (2d Cir. 1983). See also *NLRB* v. *Amalgamated Clothing Workers, Local 990*, 430 F.2d 966, 971 (5th Cir. 1970); *United States* v. *Pooler*, 13 M.J. 786, 789 (A.C.M.R.), petition denied, 14 M.J. 237 (C.M.A. 1982).

In the instant case, there is no reason to believe that the Court of Military Review failed to consider all six issues presented by petitioner. In fact, the court specifically stated (Pet. App. 11a) that it had considered the assigned errors and found them to be without merit. Petitioner, who has been represented by counsel at every step of this litigation, thus received adequate assurance that the Court of Military Review had examined the entire record and all of the issues raised on his behalf. Nothing further is required.

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[4]For the fiscal year ending September 30, 1984, the Navy-Marine Corps Court of Military Review reviewed 5,267 cases. *Annual Report of the Judge Advocate General of the Navy for Fiscal Year 1984*, 20 M.J. at CXLVII, CLVI (1985). See also *id.* at CXLV, CLXVII, CLXXIII (cases reviewed by Army, Air Force, and Coast Guard Courts of Military Review).

The same need to conserve judicial resources applies with equal force to the Court of Military Appeals. During fiscal year 1984, that court received 3,296 total filings (including 3,226 petitions for review) and resolved 4,038 matters (including 3,528 petitions). In completing its work, the court issued 90 signed opinions, 21 per curiam opinions, and 3,927 memoranda or orders. *Report of the United States Court of Military Appeals*, 20 M.J. at CXXI, CXXXI-CXXXIII (1985).

d. Finally, the issuance of a per curiam summary affirmance by the Court of Military Review accords with long-standing civilian appellate practice. All of the United States Courts of Appeals issue per curiam orders and summary dispositions to resolve significant numbers of civil and criminal appeals. This practice is authorized by the Federal Rules of Appellate Procedure and the circuits' local rules issued pursuant thereto, which allow, and in some cases encourage, the use of unpublished summary dispositions.[5] Aside from his bald assertion that a decision issued without a written opinion is a "facade" (Pet. 2), petitioner advances no tenable reason to justify his proposal to strip military appellate courts of the discretion to handle their caseloads in the same manner as the civilian courts of appeals.

2. In the second question he presents for review (Pet. i), petitioner argues that the Court of Military Appeals erred in granting review limited to one issue specified by the court (see note 2, *supra*) and in determining not to consider the four issues presented by petitioner. However, in cases reviewed "upon petition of the accused," Congress invested the Court of Military Appeals with discretion to determine which, if any, issues to consider. Art. 67(b)(3), UCMJ, 10 U.S.C. 867(b)(3). The legislative history of the UCMJ confirms Congress's intention to afford the Court of Military Appeals substantial latitude in determining which issues to consider on grant of review.[6] See also *United States* v.

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[5]See, *e.g.*, Fed. R. App. P. 47; Fed. Cir. R. 18(a); D.C. Cir. R. 13(c), 17(g); 1st Cir. R. 12, 14, App. I(B)(a); 2d Cir. R. § 0.23; 4th Cir. R. 18; 5th Cir. R. 47.5, 47.6; 6th Cir. R. 24; 7th Cir. R. 35; 8th Cir. R. App. (Plan for Publication of Opinions); 9th Cir. R. 21; 10th Cir. R. 17; 11th Cir. R. 25; Temp. Emer. Ct. App. R. 29(b).

[6]*Uniform Code of Military Justice: Hearings on S. 857 and H.R. 4080 Before a Subcomm. of the Senate Comm. on Armed Services*, 81st Cong., 1st Sess. 45 (1949) (cases reviewed on petition of the accused are "like a petition for certiorari, if the accused can show good cause why it should be reviewed for questions of law"); *id.* at 52, 54, 116; H.R. Rep.

Kelly, 14 M.J. 196, 200 (C.M.A. 1982) (emphasis in original) ("action *may* be taken by our Court with respect to * * * those [issues] raised by an accused seeking review under Article 67(b)(3)"). Thus, the Court of Military Appeals acted well within its statutory discretion when it declined to grant review on the issues tendered by petitioner.[7]

491, 81st Cong., 1st Sess. 7, 32 (1949); S. Rep. 486, 81st Cong., 1st Sess. 29 (1949).

[7]Nothing in the Military Justice Act of 1983, Pub. L. No. 98-209, 97 Stat. 1393 *et seq.*, altered the discretion of the Court of Military Appeals to determine which, if any, issues presented by an accused it should consider. The primary purpose of Section 10(a)(1) of the Act, 28 U.S.C. (Supp. I) 1259, which gave this Court certiorari jurisdiction over certain classes of cases decided by the Court of Military Appeals, was to provide a less cumbersome means for seeking discretionary review by this Court than had previously been available when the Court's jurisdiction was limited to collateral review in habeas corpus proceedings. See, *e.g.*, S. Rep. 98-53, 98th Cong., 1st Sess. 9, 32-34 (1983). At the same time, however, Congress made it clear that the Court of Military Appeals was to remain "the primary interpreter of military law" (*id.* at 10) and that it expected this Court to review only a very small number of cases (*ibid.*). Finally, Congress amended Article 67 of the UCMJ, 10 U.S.C. (& Supp. II) 867, in certain minor respects, but it made no change whatever in the discretionary jurisdiction of the Court of Military Appeals under Article 67(b)(3), 10 U.S.C. 867(b)(3).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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No. 85-970

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

MARK A. THOMPSON,

Petitioner,

v.

UNITED STATES OF AMERICA

On Petition For A Writ of Certiorari To The United States Court Of Military Appeals

PETITIONER'S REPLY TO BRIEF FOR THE UNITED STATES IN OPPOSITION

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REPLY OF PETITIONER TO BRIEF FOR THE UNITED STATES IN OPPOSITION

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1. The Brief in Opposition misstates the position of the Petitioner, both in the statement of "Questions Presented" and at the outset of the "Argument," page 4. Petitioner does not contend that military appellate courts must "issue opinions fully articulating the reasons underlying their disposition of each error assigned or issue presented on appeal." The questions presented by the petition instead relates to whether military appellate courts may "fail to decide specifically on the record issues of violations of rights and immunities guaranteed under the Constitution of the

United States which, in a brief timely filed on behalf of a person convicted upon trial before a general court-martial, are asserted as having denied such person a lawful trial and as having resulted in such person's being erroneously convicted of infamous offenses and sentenced. . . to. . . years confinement at hard labor. . ." It will be seen that the questions actually presented by the Petitioner delimit the situations in which articulation of reasoning of military appellate courts would be required. *United States* v. *Augenblick*, 393 U.S. 348 (1969), indicates that "errors rising to the constitutional level" amount to something more than a failure to comply with a federal statutory requirement, in a situation in which it appears improbable that compliance would have affected the outcome. The "Questions Presented," as actually stated at the outset in the Petition, posit a situation involving: (a) trial before a *general* court-martial, which excludes the great mass of military cases handled by lesser *special* and *summary* courts-martial. (b) conviction of *infamous* offenses, as contemplated by the Fifth Amendment. (c) a sentence including confinement at hard labor for a period of years, hence involving substantial deprivation of liberty. The number of military cases which will meet all of the stated conditions is small. That number will be reduced still further by the exclusion, for reasons of practicality, of situations which call for a high order of military expertise for accurate resolution of issues presented.

2. A case such as that of the Petitioner is statutorily required to be referred to a Court of Military Review. In such a case, § 866(c) of Title 10, U.S. Code, explicitly provides that the Court of Military Review, "*may* affirm *only* such findings of guilty and

the sentence or such part or amount of the sentence, as it finds *correct in law and fact* and determines, on the basis of the entire record, *should* be approved. . ." (italics for emphasis supplied). The following § 867, in subsection (d), defining and governing the operations of the civilian Court of Military Appeals, limits the action of that Court to matters of law, and to the findings and sentence "as affirmed or set aside as incorrect *in law*" [italics supplied] by the Court of Military Review. The case of Petitioner presented briefed issues respecting search and seizure and suggestive influence upon eyewitness identification, concerning which issues—as arising in varied factual situations—much has been written, and differing opinions expressed, by learned Justices of this Court. Is it conceivable that the Congress in 1950—in enacting a reformed military justice system, a prime announced objective of which was to reduce the control exercised by lay military commanders over courts-martial—intended that the final word as to such issues of law when presented in a case tried in the Armed Forces, should be that of a group of lay military officers appointed *ad hoc* to additional duty as members of a court-martial, whose future careers are under the control of the military commander who ordered the proceeding? The realities of the situation are patent: The judgment of the military commander (and of those who advised him) in ordering the trial is at stake, and a subordinate officer whose action is necessarily impeaching that judgment need have a supporting record which clearly demonstrates on its face that no alternative course was avaliable. There is in the military situation no anonymous juror who can return to his home after the trial and remain ever after accountable only to his own conscience.

3. The Brief in Opposition at the outset animadverts Petitioner's not having cited authority. Statutes and regulations set forth in the petition, considered against the background of the well-known general military situation, provide all material needed at this juncture for an understanding of the plight of the Petitioner and the relief sought by him. Rule 21.1.(j) of the Rules of this Court limit a petition for certiorari to, "A direct and concise argument amplifying the reasons relied on for the allowance of the writ," and Rule 21.3 states: "No separate brief in support of a petition for a writ of certiorari will be received, and the Clerk will refuse to file any petition for a writ of certiorari to which is annexed or appended any supporting brief." Petitioner hopes that the thirst for authority may be somewhat slaked, while avoiding the strictures of Rule 21.3, by a brief quotation from the *Code Napoleon* (March 15, 1803), Preliminary Title, Article the First, paragraphs 4. and 5.:

> 4. The judge who shall refuse to give judgment under pretext of the silence, obscurity, or insufficiency of the law, may be prosecuted as guilty of denying justice.
>
> 5. It is forbidden to judges to pronounce by way of general and regulatory ordinance,* upon the causes brought before them.
>
> * *Par voie de disposition generale et reglementaire*

4. On page 6 of the Brief in Opposition, *Taylor* v. *McKeithen*, 407 U.S. 191 (1972), is cited for the proposition that federal courts are not required to render opinions in support of their decisions. The actual holding of six Justices in that case was that a Fifth Circuit

Court of Appeals judgment, rendered without supporting opinion, would be vacated, and the cause remanded. Five Justices concurred in a per curiam opinion holding that the record was not fully informative as to the precise nature of the litigation, and the Supreme Court did not have the benefit of the insight of the Court of Appeals. Three Justices dissented on the ground that the length and content of opinions are best left to the discretion of the judges making decisions, and the five Justices concurring in the per curiam opinion, in a footnote recognized such as being the general rule. The case concerned reapportionment in Louisiana, including an area embracing a portion of the City of New Orleans, and the Court of Appeals had reversed a plan, as drawn by a Master of the District Court, in favor of an alternative plan presented by the Attorney General of Louisiana. It was not indicated whether the above-quoted provisions of the *Code Napoleon* continued in effect in Louisiana or entered into the discussion of the *Taylor* case. Suffice it to say in the instant connection, that the case of the Petitioner involves no such political thicket as reapportionment; that the statutes governing military appellate courts differ in terms and background from those applying to Article III courts; *Taylor* does not appear to have presented any situation wherein any individual had languished in confinement for years under a conviction seriously challenged as to its constitutional validity; and no basic Bill of Rights issue seems to have been presented in that case.

5. Quoting from page 6 of the Brief in Opposition:

> In the instant case, there is no reason to believe that the Court of Military Review failed to consider all six issues presented by petitioner. In fact, the court specifically stated (Pet. App. 11a) that it had considered the assigned errors and found them to be without merit.

The foregoing "adequate assurance that the Court of Military Review had examined the entire record and all of the issues raised on . . . [Petitioner's] . . . behalf" does not satisfy counsel for Petitioner, much less the Petitioner himself in his cell at Fort Leavenworth. For those who are thus satisfied, it would seem to be a modest proposal, considering constraints both imposed and threatened by the Balanced Budget and Emergency Deficit Control Act of 1985, that Courts of Military Review be replaced by much less expensive word processing equipment which would endorse upon court-martial records, "The Court has considered the assigned errors and found them to be without merit."

6. Regarding the second question presented, as to the obligation imposed upon the civilian Court of Military Appeals in the case of the Petitioner, it should be noted that the Court of Military Appeals, in considering a petition for grant of review, has before it the complete court-martial record, not simply the petition, supplemented by assignments of error, and answers to such assignments. In the case of Petitioner, the Court of Military Appeals had before it for a period of over twenty months the complete record; supplemented petition for grant of review; a petition for new trial; brief in support of petition for new trial; and answers of the Government to both petitions. Review was granted only as to a trivial issue of multiplicity of specifications; separate speci-

fications alleging conspiracy were consolidated; and no change was indicated as to the sentence. The petition for new trial was denied, approximately one month after the foregoing action, without explanation of the rationale. The supplement to the petition for grant of review specifically assigned as asserted error the failure of the Court of Military Review to treat specifically the constitutional issues of unlawful search and seizure and unduly suggestive eyewitness identification. Whatever might have been the action of a federal Circuit Court of Appeals in the same situation (the offenses of which Petitioner now stands convicted could as well have been charged and tried in a United States District Court), and whatever might have been the action of this Court in the exercise of its supervisory role, the Court of Military Appeals operates under a more explicit statutory authority and is limited to consideration of a much more restricted category of subject matter. Cursive consideration of the some ninety cases annually in which the Court of Military Appeals renders signed opinions reveals no preponderance of cases presenting issues of law of greater significance from servicewide and individual standpoints.

7. Whatever the motivation underlying the action of the Court of Military Appeals in granting review as it did, and disposing of the case as it did, the salient fact remains that it *did* grant the petition for review, and in so doing conferred certiorari jurisdiction upon this Court. It is respectfully requested that review upon writ of certiorari be granted in this case in order that individual members of the United States Armed Forces may know that they retain essential protections of the Constitution, and that counsel rep-

resenting such individual members may be assured that theirs is a substantive role subject to record evaluation, and not a staged histrionic display in a mock contest of which the end result must invariably be according to the script.

8. An unsigned copy of a certificate of service accompanying the Brief in Opposition indicates that copies thereof were mailed to Counsel for Petitioner on 7 March 1986. Copies were in fact delivered by mail to counsel on the late afternoon of Saturday, March 15th, contained in a Department of Justice envelope bearing no postmark.

CONCLUSION

The instant petition presents an ideal vehicle for providing guidance to both the military community and the legal community concerning the proper function of military review and appellate tribunals in cases of prosecutions for alleged common law crimes which present constitutional issues, as well as for construction of the amendments respecting review of court-martial action effected by the Military Justice Act of 1983. Review upon writ of certiorari is also available to the Government under that Act, and requirement of disposition upon the record of presented constitutional issues could provide both a deterrent and facilitated corrective action in a future situation in which an unsound constitutional interpretation or application in favor of an individual might pose a threat to penal law enforcement both in and out of the Armed Forces. In the instant case, grant of review upon certiorari will serve the interests of justice to the individual Petitioner as well as the general public concerns with sound morale in the Armed Forces and the overall system of criminal justice in the United States.

Respectfully submitted.

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March, 1986